

HIGH COURT OF ORISSA: CUTTACK

I.A. No. 02 of 2018
(Arising out of ARBP No. 53 of 2004)

In the matter of an application for substitution of the Arbitrator.

M/s. B. Engineers & Builders Ltd. ... Petitioner

-Versus-

State of Odisha and others ... Opp. Parties

For Petitioner : Mr. Siddhant Dwibedi

For Opp. Parties : Mr. P.K. Muduli
Addl. Government Advocate

P R E S E N T:

THE HONOURABLE THE CHIEF JUSTICE SHRI K.S. JHAVERI

Heard and decided on 01.02.2019

O R D E R

K.S. JHAVERI, C.J. Heard learned counsel for the petitioner and learned Additional Government Advocate for the State-opposite parties.

2. By way of this Interim Application, the petitioner has approached this Court with a prayer to substitute the Arbitrator appointed vide order dated 11.4.2008 in ARBP No. 53 of 2004.

3. Learned counsel for the petitioner submits that the original claim of the petitioner was Rs. 9,48,51,984/-, as against the claim of Rs. 44,14,59,621/-. The case of the petitioner in brief is that this Court, after considering the entire fact situation of the case and since there were disputes and differences between the parties, vide order dated 9.8.2007 disposed of the ARBP No. 53 of 2004 by appointing Mr. Justice Purna Chandra Mishra, a retired Judge of this Court as an Arbitrator to adjudicate the disputes between the parties. However, due to certain inconvenience Justice P.C. Mishra did not want to continue as Arbitrator.

3.1 This Court vide order dated 28.9.2007 appointed Mr. Justice Pradyumna Kumar Mohanty, a retired Judge of this Court as the sole Arbitrator. However, on 17.03.2008 Mr. Justice Mohanty did not want to continue as the Arbitrator and in view of that on 11.04.2008, this Court appointed Mr. Justice C.R. Pal, a retired Judge of this Court as a new sole Arbitrator.

3.2 Mr. Justice C.R. Pal entered into reference and held several arbitration proceedings from time to time. The parties filed their respective pleadings where after evidence of witnesses were also taken up and likewise, during the proceedings, different orders came to be passed and the last order which has been

shown to me was passed by the Arbitrator on 6.8.2016, which reads as under:

“Shri H.M. Dhal, Advocate for the State appeared and filed a petition stating that in view of the Writ Appeal No. 355 of 2016 filed before the Hon’ble Court against the judgment dated 23.12.2015 passed in W.P.(C) No. 21494 of 2012 which is pending before the Hon’ble Court for disposal, the arbitration proceeding may not be taken up and be adjourned until the Writ Appeal No. 355 of 2016 is disposed of. No one is present for the Respondent.

Considering the petition the hearing of the case is postponed until receipt of further order of the Hon’ble Court. This may be intimated to the counsel for the respondent.”

4. That Writ Appeal No. 355 of 2016 came to be dismissed on 4.11.2016. Thereafter, on 22.06.2017 and 28.10.2017 applications were moved by the petitioner before the learned Arbitrator for fixing the arbitration meeting. But the learned Arbitrator has not taken up the matter and when the petitioner appeared before the learned Arbitrator and requested him for taking steps for disposal of the dispute, learned Arbitrator stated that taking into consideration the current ailing physical condition he is not in a position to take up the issues. Hence, the petitioner has approached this Court for substitution of the Arbitrator considering the long standing dispute since 2004.

5. Mr. P.K. Muduli, learned Addl. Government Advocate for the opposite parties raised objection to this Interim Application

stating that the present IA for self same relief is not maintainable. It is further submitted that there is no termination of the Arbitral proceeding as on date and there is no written unwillingness of the learned Arbitrator and in the absence of such material the IA for appointment or another Arbitrator is not maintainable.

6. Learned counsel for the petitioner, in support of his submission for substitution of the Arbitrator, placed reliance upon the judgment of the Supreme Court in the case of **North Eastern Railway Vs. Tripple Engineering Works**, reported in (2014) 9 SCC 288 wherein at paragraphs 5 to 8 the Supreme Court has observed as under:

“5. The “classical notion” that the High Court while exercising its power under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter for short ‘the Act’) must appoint the arbitrator as per the contract between the parties saw a significant erosion in Ace Pipeline Contracts (P) Ltd. Vs. Bharat Petroleum Corporation Ltd.[1] wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd.[2] wherein following a three Judges Bench decision in Punj Lloyd Ltd. Vs. Petronet MHB Ltd.[3] it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious. The apparent dichotomy in ACE Pipeline

(supra) and Bharat Battery Manufacturing Co. (P) Ltd. (supra) was reconciled by a three Judges Bench of this Court in Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited[4] where the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasized by taking into account the expression “to take the necessary measure” appearing in sub- section (6) of Section 11 and by further laying down that the said expression has to be read alongwith the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in Indian Oil Corporation Limited and Others Vs. Raja Transport Private Limited[5]. Paragraph 48 of the report wherein the scope of Section 11 of the Act was summarized may be quoted by reproducing sub-paragraphs (vi) and (vii) herein below.

“(vi) The Chief Justice or his designate while exercising power under sub- section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.”

6. The above discussion will not be complete without reference to the view of this Court expressed in Union of India Vs. Singh Builders Syndicate[6] wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in paragraph 25 of the report in Singh Builders Syndicate (supra) this Court had suggested that the government, statutory authorities and government companies should consider phasing out arbitration

clauses providing for appointment of serving officers and encourage professionalism in arbitration.

7. A pronouncement of late in Deep Trading Company Vs. Indian Oil Corporation and Others[7] followed the legal position laid down in Punj Lloyd Ltd. (supra) which in turn had followed a two Judges Bench decision in Datar Switchgears Ltd. Vs. Tata Finance Ltd.[8]. The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Company (supra) subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Administration (supra) not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act.

8. In the present case Clauses 64(3)(a)(ii) and (iii) of the General Conditions of Contract do not prescribe any specific qualification of the arbitrators that are to be appointed under the agreement except that they should be railway officers. As already noticed, even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting under Section 11(6), in an appropriate case to depart therefrom. In Singh Builders Syndicate (supra) pendency of arbitration proceedings for over a decade was found by this Court to be a mockery of the process. In the present case, admittedly the award in respect of disputes and differences arising out of the contract No. CAO/CON/722 is yet to be passed. Though the appellant-Railway has in its pleadings made a feeble attempt to contend that the process of arbitration arising out of the said Contract has been finalized, no material, whatsoever, has been laid before the Court in support thereof. The arbitration proceedings to resolve the disputes and differences arising out of Contract No. CAO/CON/738 has not even commenced. A period of nearly two decades has

elapsed since the contractor had raised his claims for alleged wrongful termination of the two contracts. The situation is distressing and to say the least disturbing. The power of the Court under the Act has to be exercised to effectuate the remedy provided thereunder and to facilitate the mechanism contemplated therein. In a situation where the procedure and process under the Act has been rendered futile, the power of the Court to depart from the agreed terms of appointment of arbitrators must be acknowledged in the light of the several decisions noticed by us. We are, therefore, of the view that no infirmity muchless any illegality or failure of justice can be said to be occasioned by the order passed by the High Court so as to warrant any interference. We, therefore, unhesitatingly dismiss this appeal filed by the appellant-railways. However, in the facts of the case we do not deem it appropriate to burden the appellant with any costs.”

7. Learned counsel for the petitioner also relied upon another decision of the Supreme Court in the case of ***Union of India Vs. U.P. State Bridge Corporation Ltd.***, reported in (2015) 2 SCC 52, wherein at paragraphs 18 to 22 the Court has observed as under:

“18. First and paramount principle of the first pillar is “fair, speedy and inexpensive trial by an Arbitral Tribunal”. Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the Arbitration Agreement which the parties have agreed to, that has to be generally resorted to. It is because of this reason, as a normal practice, the Court will insist the parties to adhere to the 15 procedure to which they have agreed upon. This would apply even while making the appointment of substitute arbitrator and the general

rule is that such an appointment of a substitute arbitrator should also be done in accordance with the provisions of the original agreement applicable to the appointment of the arbitrator at the initial stage. (see *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.* and another, (2006) 6 SCC 204. However, this principle of party autonomy in the choice of procedure has been deviated from in those cases where one of the parties have committed default by not acting in accordance with the procedure prescribed. Many such instances where this course of action is taken and the Court appoint the arbitrator when the persona designata has failed to act, are taken note of in para 5 of *Tripple Engineering Works* (supra). We are conscious of the fact that these were the cases where appointment of the independent arbitrator made by the Court in exercise of powers under Section 11 of account of 'default procedure'. We are, in the present case, concerned with the constitution of substitute Arbitral Tribunal where earlier Arbitral Tribunal has failed to perform. However, the above principle of default procedure is extended by this Court in such cases as well as is clear from the judgment in *Singh Builders Syndicate* (supra).

19. In the case of contracts between Government Corporations/ State owned companies with private parties/ contractors, the terms of the agreement are usually drawn by the Government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a managing director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designata to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able to devote time to the

arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers etc., then the principle of 'default procedure' at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be taken or not. What we emphasise is that Court is not powerless in this regard.

20. In *Singh Builders Syndicate* (supra) where pendency of arbitration proceedings for over a decade was found by this Court to be a mockery of a process. This anguish is expressed by the Court in the said judgment in the following manner:

“15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of the parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the arbitration agreement, the Chief Justice or his designate, required to exercise power under Section 11 of the Act, can step in and pass appropriate orders. 16. We fail to

understand why the General Manager of the Railways repeatedly furnished panels containing names of officers who were due for transfer in the near future. We are conscious of the fact that a serving officer is transferred on account of exigencies of service and transfer policy of the employer and that merely because an employee is appointed as arbitrator, his transfer cannot be avoided or postponed. But an effort should be made to ensure that officers who are likely to remain in a particular place are alone appointed as arbitrators and that the

Arbitral Tribunal consisting of serving officers, decides the matter expeditiously.

17. Constituting Arbitral Tribunals with serving officers from different far-away places should be avoided. There can be no hard-and-fast rule, but there should be a conscious effort to ensure that the Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades.

18. As noticed above, the matter has now been pending for nearly ten years from the date when the demand for arbitration was first made with virtually no progress. Having regard to the passage of time, if the Arbitral Tribunal has to be reconstituted in terms of Clause 64, there may be a need to change even the other two members of the Tribunal.

19. The delays and frequent changes in the Arbitral Tribunal make a mockery of the process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court as sole arbitrator does not call for interference in exercise of jurisdiction under Article 136 of the Constitution of India.”

21. The appointment of arbitrator by the Court, of its own choice, departing from the arbitration clause, is therefore not unknown and has become an acceptable proposition of law which can be termed as a legal principle which has come to be established by a series of judgments of this Court. Reasons for debating such a course of action are not far to seek and already taken note of above.

22. In the present case, we find the fact situation almost same as in Tripple Engineering Works (supra) and Singh Builders Syndicate (supra). If the contention of the appellant is allowed, it would amount to giving premium to the appellant for the fault of the Arbitral Tribunal's members who were appointed by none else but by appellant itself. As pointed above, the appellant has not questioned the order of the High Court in so far as it has terminated the mandate of the earlier Arbitral Tribunal because of their inability to perform the task assigned to them. In such a situation, leaving the respondent at the mercy of the appellant thereby giving the power

to the appellant to constitute another Arbitral Tribunal would amount to adding insult to the serious injury already suffered by the respondent because of non conclusion of the arbitral proceedings even when the dispute were raised in the year 2007. In case, the cherished and benevolent purpose and objective of speedy resolution of the disputes by arbitral proceedings is to be accomplished, it becomes the bounden duty of the persona designata to appoint such arbitrator(s) who have sufficient time at their disposal to attend to this task assigned to them and to conclude the arbitral proceedings in a speedily manner. It is a common sight that the officers who are awfully busy in their other routine functions, because of their status and position, are made arbitrators. For them, discharge of their other duties assumes more importance (and naturally so) and their role as the arbitrators takes a back seat. This kind of behaviour showing casual approach in arbitration cases is anathema to the very genesis of arbitration. Therefore, where the Government assumes the authority and power to itself, in one sided arbitration clause, to appoint the arbitrators in the case of disputes, it should be more vigilant and more responsible in choosing the arbitrators who are in a position to conduct the arbitral proceedings in an efficient manner, without compromising with their other duties. Time has come when the appointing authorities have to take call on such aspects failing which (as in the instant case), Courts are not powerless to remedy such situations by springing into action and exercising their powers as contained in Section 11 of the Act to constitute an Arbitral Tribunal, so that interest of the other side is equally protected.”

Relying on the aforesaid decisions, learned counsel for the petitioner contended that in view of the facts stated above, the present Arbitrator is required to be substituted by allowing the present IA.

8. Mr. Muduli, learned Addl. Government Advocate for the opposite parties strongly objected to the submissions made by the learned counsel for the petitioner and placed reliance upon a recent decision of the Supreme Court in the case of **Rajasthan Small Industries Corporation Limited Vs. Ganesh Containers Movers Syndicate** decided on 23.01.2019 in Civil Appeal No. 1039 of 2019, particularly the observations made by the Court at paragraphs 28 and 29 of the decision, which reads as under:

“Whether the High Court was right in terminating the mandate of the arbitrator appointed as per the agreement:-

28. The main question falling for consideration is whether the High Court was right in terminating the mandate of the arbitrator appointed as per the agreement and appointing a substitute arbitrator in the application filed under Section 11(6) and Section 15 of the Arbitration Act. As pointed out earlier, the proceedings before the Arbitral Tribunal proceeded till 17.08.2011 and thereafter, no progress was made. The respondent issued legal notice on 07.02.2013 calling upon the appellant to pay Rs.3.90,81,602/- alleging that the said amount was settled during the course of proceedings before the Arbitral Tribunal. Reiterating the demand, the respondent has again sent the legal notice on 07.03.2013. However, no award came to be passed. The respondent filed application under Sections 11 and 15 of the Act of 1996 on 13.05.2015 seeking appointment of an independent arbitrator for adjudication of the disputes and differences between the appellant and the respondent.

29. In support of his contention, the learned counsel for the respondent relied upon the decision in Union of India and others v. Uttar Pradesh State Bridge

Corporation Limited (2015) 2 SCC 52. Learned counsel for the respondent contended that the arbitrator failed to conclude the proceedings even after four years and the High Court rightly appointed the substitute arbitrator departing from the arbitration clause in the agreement between the parties.

In the said case, since the Arbitral Tribunal did not pass award in spite of expiry of four years, the respondent thereon filed Request Case No.10/2010 and the High Court passed order dated 09.03.2011 giving the last chance to the Arbitral Tribunal to complete the arbitral proceedings within a period of three months. In para (6) of the judgment, this Court pointed out that the High Court took note of the various dates and hearings that are fixed by the Tribunal between 25.03.2011 and 25.06.2011 and came to the conclusion that the delay caused in the arbitral proceedings was intentional.

After referring to Union of India v. Singh Builders Syndicate (2009) 4 SCC 523 and other judgments, this Court observed that the delays and frequent changes in the Arbitral Tribunal defeat the process of arbitration and therefore, the appointment of the arbitrator by the court of its own choice departing from the arbitration clause has become an acceptable proposition of law which can be termed as a legal principle which has come to be established by a series of judgments of this Court. Having regard to the facts of the said case, observing that the delay in arbitral proceedings was intentional, in para (6) of Uttar Pradesh State Bridge Corporation Limited, it was held as under:-

"6. The High Court took note of the various dates of hearings that are fixed by the Tribunal between 25-3-2011 and 25-6-2011 and came to the conclusion that delay caused in the arbitral proceedings was intentional. So much so, the members of the Arbitral Tribunal were continuing their dilatory tactics in deciding the matter before it since 2007 and four years had passed in the process. The Tribunal had faltered even after giving specific directions to

conclude the matter within three months and long adjournments were granted thereby violating the specific directions of the High Court. Terming this attitude of the members of the Tribunal as negligent on their part towards their duties with no sanctity for any law or for the orders of the High Court, the High Court allowed the petition of the respondent herein and set aside the mandate of the Tribunal with the appointment of sole arbitrator by the Court itself."

9. Learned counsel for the opposite parties also submits that this IA is not maintainable in a disposed of matter seeking the self same relief for appointment of Arbitrator. In this regard, he placed reliance upon a decision of the Supreme Court in the case of ***State of Uttar Pradesh Vs. Shri Brahm Datt Sharma and another***, reported in AIR 1987 SC 943, particularly to the observation made at paragraph 10, which reads as under:

"10. The High Court's order is not sustainable for yet another reason. Respondents' writ petition challenging the order of dismissal had been finally disposed of on 10.8.1984, thereafter nothing remained pending before the High Court. No miscellaneous application could be filed in the writ petition to revive proceedings in respect of subsequent events after two years. If the respondent was aggrieved by the notice dated 29.1.86 he could have filed a separate petition under Art. 226 of the Constitution challenging the validity of the notice as it provided a separate cause of action to him. The respondent was not entitled to assail validity of the notice before the High Court by means of a miscellaneous application in the writ petition which had already been decided. The High Court had no jurisdiction to entertain the application as no proceedings were pending before it. The High Court committed error in entertaining the respondent's application which was founded on a separate cause of action. When proceedings stand terminated by

final disposal of writ petition it is not open to the Court to reopen the proceedings by means of a miscellaneous application in respect of a matter which provided a fresh cause of action. If this principle is not followed there would be confusion and chaos and the finality of proceedings would cease to have any meaning.”

10. Learned counsel for the opposite parties also placed reliance on the provisions under Section 14 of the Arbitration and Conciliation Act, 1996 and submits that as per Section 14(1) the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and (b) he withdraws from his office or the parties agree to the termination of his mandate. However, in the case in hand neither the present Arbitrator communicated in writing about his unwillingness or his inability to perform his functions due to ailment.

10.1 There is no iota of evidence that the learned Arbitrator became de-facto or de-jure unable to perform his functions or for other reasons fails to act without undue delay or he has withdrawn from his office.

10.2 Further, Section 14(2) of the Act provides that if a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed

by the parties, apply to the Court to decide on the termination of the mandate.

10.3 In view of that, the petitioner could have approached the competent District Court in case of such dispute for termination of the mandate of the Arbitrator. Therefore, it is submitted that this application for appointment of another independent Arbitrator at this stage is unwarranted and as such the present IA deserves no merit for consideration and liable to be dismissed.

11. Mr. Muduli, also referred to paragraphs 3 to 5 of the objection filed on behalf of the opposite parties raising contentions regarding non-maintainability of the present application, which are quoted herein below:

“3. That after disposal of ARBP No. 53/2004 which was filed U/s. 11(6) of the Arbitration and Conciliation Act, 1996, present I.A. No.2/2018 for self same relief is not maintainable. It is relevant to mention here that ARBP. No. 53/2004 was filed by the petitioner U/s. 11(6) of the Act, 1996 before the Hon’ble Court. Therefore, present IA filed by the same petitioner U/s. 11(6) of the Act, 1996 is not maintainable.

4. That there is no termination of the Arbitral proceeding. That apart, there is no material with regard to unwillingness of the Hon’ble sole Arbitrator to proceed with Arbitration proceeding. Further also there is no material to show that the Hon’ble Sole Arbitrator is unable to perform his function or fails to proceed with Arbitration proceeding. In absence of such materials, present I.A. filed by the petitioner U/s. 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an Independent Sole Arbitrator is not maintainable.

5. That admittedly by order dated 9.8.2007 the Hon’ble Court has disposed of ARBP No. 53 of 2004. Hon’ble Justice C.R. Pal (Retd.) has been appointed as the sole Arbitrator to adjudicate the Arbitration proceeding. Hon’ble Justice C.R. Pal (Retd) is conducting the

Arbitration proceeding. Therefore, present I.A. filed by the petitioner in a disposed of case is not maintainable as the connected ARBP has already been disposed of.”

12. I have heard learned counsel for both the parties and gone through the records in detail.

12.1 Before proceeding with the matter it must be indicated here that the very purpose of the arbitration is to resolve the disputes between the parties and put an end to the litigation and if it will linger for a lengthy period or years together, the purpose will be frustrated.

13. The first contention of the learned counsel for the opposite parties that in view of Section 14(2) of the Act the petitioner should approach the District Court for termination of the mandate of the present Arbitrator is not tenable for the reason that when this Court has appointed the Arbitrator and if the Arbitrator is not in a position to perform his arbitration proceedings in spite of repeated approach and the Arbitration before him is pending since 2008, the petitioner has rightly approached this Court for substitution of the Arbitrator and this Court has jurisdiction to substitute the Arbitrator.

13.1 If the petitioner will approach the District Court and then the High Court there would be unnecessary delay by adopting the lengthy procedure and as the matter is pending since 2004, the very purpose of the arbitration will be frustrated if there will be inordinate delay.

In view the decisions in ***North Eastern Railway Vs. Tripple Engineering Works*** (*supra*) and ***Union of India Vs. U.P. State Bridge Corporation Ltd.*** (*supra*), the Court must keep in mind that the first and paramount principle of the first pillar is fair, speedy and inexpensive trial by an Arbitral Tribunal and unnecessary delay or expense would frustrate the very purpose of arbitration. Hence it cannot be said that this Court has no jurisdiction or that the present IA for substitution is not maintainable.

14. It is an undisputed fact that the present Arbitrator was appointed by substitution by this Court on 11.04.2008 and he entered upon the reference in the year 2008. As it appears that the last order passed by the learned Arbitrator was on 6.8.2016 indicating that since a Writ Appeal is pending before the High Court, proceedings are postponed until receipt of further order. However, the said Writ Appeal came to be dismissed on 4.11.2016 and since the proceeding was not initiated thereafter, on 22.06.2017 an application was moved by the petitioner before the learned Arbitrator for fixing the arbitration meeting.

14.1 But as on date the learned Arbitrator has not fixed any date for arbitration in spite of such application. Therefore, it will be unreasonable and unjustified if the contention of the opposite parties is accepted that the petitioner shall wait till a written order

/communication is made by the learned Arbitrator regarding his ailment or unwillingness to continue in the arbitration.

14.2 In view of the new Section 29-A inserted vide Arbitration & Conciliation (Amendment) Act, 2015 the arbitration proceedings shall be completed and award shall be made within a period of twelve months from the date of arbitral tribunal enters upon the reference. The said provision clearly speaks the intendment of the Arbitration. However, in the instance case, the present learned Arbitrator was appointed and enter reference in the year 2008 and though in the meantime about a decade has passed, the matter is pending adjudication. Therefore, the petitioner has rightly approached this Court by way of this IA for substitution of the Arbitrator and this Court has jurisdiction to substitute an Arbitrator. Hence, the contentions raised by the opposite parties are misconceived and rejected.

15. Considering the entire fact situation of the case narrated above, I allow this application by substituting the Arbitrator and hereby appoints **Mr. Justice A.K. Parichha**, a former Judge of this Court as the sole Arbitrator to adjudicate the disputes and differences between the parties. The learned Arbitrator shall proceed in continuation of the previous arbitral tribunal. The material already on record shall be deemed to have been received by the new Arbitrator.

Taking into consideration the period lapsed and the status of the proceedings as on date, learned Arbitrator shall conclude the proceeding as expeditiously as possible preferably within a period of six months from the date of entering into the reference.

The venue of the arbitration shall be at High Court of Orissa Arbitration & Mediation Centre, Cuttack. It is open for the parties to file their objections whatsoever before the learned Arbitrator and the learned Arbitrator shall hear all the objections and cross objections of the parties.

It is needless to say that the fees of the Arbitrators shall be as per the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015.

This ARBP is allowed and disposed of accordingly.

Issue urgent certified copy as per rules.

This order be communicated to the learned new Arbitrator, forthwith.

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(K.S. Jhaveri)
Chief Justice